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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of: **Communications Assistance for Law Enforcement Act**	**CC Docket No. 97-213**

OPPOSITION OF THE TELECOMMUNICATIONS INDUSTRY ASSOCIATION

The Telecommunications Industry Association ("TIA")[1] respectfully submits this opposition to the Petition for Reconsideration filed by the U.S. Department of Justice and the Federal Bureau of Investigation ("FBI").[2] The FBI's petition -- of the Commission's *First Report and Order*[3] on carrier security policies -- simply reiterates several claims that the Commission has already carefully considered and rejected. TIA supports the Commission's previous determinations on these issues and urges the Commission to dismiss the FBI's request for reconsideration.

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[1] TIA is a national, full-service trade association of over 900 small and large companies that provide communications and information technology products, materials, systems, distribution services and professional services in the United States and around the world. TIA is accredited by the American National Standards Institute ("ANSI") to issue standards for the industry.

[2] Petition for Reconsideration by the U.S. Department of Justice and Federal Bureau of Investigation, CC Docket No. 97-213 (filed October 25, 1999) ("FBI Petition").

[3] In the Matter of Communications Assistance for Law Enforcement Act, *Report and Order*, CC Docket No. 97-213, FCC 99-11 (rel. March 15, 1999), *Order on Reconsideration*, CC Docket No. 97-213, FCC 99-184 (rel. August 2, 1999) ("First Report & Order").

TIA particularly opposes the FBI's attempt to use its petition as a "backdoor" for circumventing a separate -- and unrelated -- decision by the Commission: that the FBI's proposed "surveillance status message" is not required by the Communications Assistance for Law Enforcement Act ("CALEA").[4] In its *Third Report and Order*,[5] the Commission rejected the FBI's assertion that this capability was required by CALEA's technical "assistance capability requirements" (section 103). The FBI chose not to challenge the *Third Report and Order*. Indeed, the FBI claims to have abandoned its previous argument, conceding that it "does not seek to challenge that ruling."[6] Nevertheless, the FBI now claims that the same surveillance status capability is mandated by a completely unrelated provision of CALEA -- section 105.

I. SURVEILLANCE STATUS MESSAGE

The FBI's insistence that industry develop a complicated technical capability to "verify that a wiretap has been established and is still functioning correctly"[7] is not new. The FBI has sought a surveillance status capability for years, during both the industry standards process (1995-1997) and the FBI's subsequent challenge of J-STD-025 before the Commission (1998-1999). What is novel is the FBI's newfound (and unsubstantiated) conviction that this capability is mandated by section 105 of CALEA.

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[4] Pub. L. 103-414, 108 Stat. 4279 (1994), *codified at* 47 U.S.C. §§ 1001 *et seq.*

[5] In the Matter of Communications Assistance for Law Enforcement Act, *Third Report and Order*, CC Docket No. 97-213, FCC 99-230, ¶ 101 (rel. August 31, 1999) ("Third Report & Order").

[6] FBI Petition, at 8.

[7] Third Report & Order, at ¶ 97.

The FBI's submission is a doubly late afterthought. It offers no credible explanation for why it has abandoned its long-held view that the surveillance status message was necessary to satisfy CALEA's "assistance capability requirements" of section 103. Nor does it explain why the novel interpretation it now adopts of section 105 was never raised before.

More importantly, the FBI's new assertion is expressly contrary to the letter and intent of CALEA. Congress clearly provided that a carrier's obligation to make technical modifications to its equipment -- like a surveillance status message -- is governed by section 103. Congress considered the assistance requirements of section 103 "to be both a floor and a ceiling."[8] In the legislative history, Congress repeatedly warned that these requirements were "intended to preserve the status quo, and ... to provide law enforcement no more and no less access to information than it had in the past."[9] Heeding this guidance, the Commission reviewed the requirements of section 103 and properly determined that a surveillance status message capability was not required. Claiming that its surveillance status capability is now mandated by a completely unrelated provision (section 105), the FBI essentially seeks to avoid these restrictions and, in the process, deem the intent of Congress to be irrelevant.

Nowhere did Congress suggest that section 105 -- which pertains to a carrier's policies and procedures -- was also meant to obligate carriers to make expensive and complicated technical modifications to their equipment. To the contrary, the principal purpose of section 105 was to protect the "security and integrity" of carriers' systems, by ensuring that law enforcement could not activate an interception without a carrier's permission. This intent is clearly reflected in the legislative history, where Congress mandated that:

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[8] H. Rep. No. 103-827, at 22 (1994) ("House Report").

[9] *Id.*

> "government agencies do not have the authority to activate remotely interceptions within the switching premises of a telecommunications carrier. Nor may law enforcement enter onto a telecommunications carrier's switching office premises to effect an interception without the carrier's prior knowledge and consent when executing a wiretap under exigent or emergency circumstances under section 2602(c)."[10]

Instead, Congress required that "all executions of court orders or authorizations requiring access to the switching facilities will be made through individuals authorized and designated by the telecommunications carrier."[11] The FBI's surveillance status message is completely irrelevant to this Congressional concern with law enforcement intrusion. By manipulating the purpose of section 105, the FBI would impose a technical obligation on carriers that Congress never even imagined when drafting the provision.

Moreover, the FBI improperly assumes that it and the Commission can ignore "technical and cost concerns."[12] To the contrary, one of Congress's principal concerns when it adopted CALEA was to ensure that "compliance with the requirements of the bill will not impede the development and deployment of new technologies."[13] As a result, Congress "establishe[d] a reasonableness standard for compliance of carriers and manufacturers" and directed the Commission to consider such factors as cost and technical feasibility when determining whether compliance is reasonable.[14] Of course, as the vast majority of parties mentioned in several rounds of comments preceding the Commission's *Third Report and Order*, the FBI's surveillance status

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10 House Report, at 26.

11 *Id.*

12 FBI Petition, at 9.

13 House Report, at 19.

14 *Id.*

message would have been extremely costly and technically difficult to implement.[15] TIA, for example, noted that the surveillance status capability:

> would require significant modifications to system architecture to verify electronically that every relevant mobile switch (and every other piece of network equipment containing intercept-related data) is operational and properly configured. No infrastructure is currently in place to permit carriers to poll network equipment in that manner. As a result, the FBI's request is one of the more technically difficult items on their punch list.[16]

After reviewing the extensive record in this proceeding, the Commission properly determined that the surveillance status message was not required by CALEA. The Commission should reject the FBI's unwarranted attempt to circumvent this record (and Congress' express mandate) by seeking to discard any consideration of cost or technical complexity.

II. CARRIER SECURITY REQUIREMENTS

The FBI has also renewed several of its proposals to impose severe administrative obligations on carrier personnel. The Commission properly rejected these proposed obligations as unnecessary and overly burdensome.[17] Carriers are more than competent to internally monitor security concerns. Moreover, several of the FBI's proposals represent a frightening invasion of the individual privacy of carrier employees. For example, TIA sees no reason for carriers to have to maintain detailed information about its employees so that law enforcement can conduct background investigations. Nor is there any reason to mandate non-disclosure affidavits from these employees. These employees are not criminals, nor are they applying to become agents of the Federal Bureau of

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[15] *See, e.g.,* Third Report & Order, at ¶ 99 & n. 187 (citing several comments).

[16] Comments of the Telecommunications Industry Association, CC Docket No. 97-213, at 38 (filed December 14, 1998).

[17] *See, e.g.,* First Report & Order, at ¶¶ 25-26.

Investigation. If Congress had shared the FBI's rampant mistrust, it would not have entrusted the responsibility for implementing wiretaps to carrier employees.[18] The Commission properly rejected these proposals in its *First Report and Order* and TIA encourages the Commission to do so again.

III. CONCLUSION

The FBI's Petition for Reconsideration amounts to little more than another attempt to relitigate, without introducing any new evidence or legal authority, several issues that the Commission has already carefully considered and rejected. For the reasons mentioned above, the Commission should do so again. In particular, the Commission should reject the FBI's belated attempt to mandate its "surveillance status message" capability through an unrelated (and completely inapplicable) section of CALEA.

Respectfully submitted,

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[18] *See, e.g.,* House Report, at 26 ("All executions of court orders or authorizations requiring access to the switching facilities will be made through individuals authorized and designated by the telecommunications carrier.").

CERTIFICATE OF SERVICE

I, Thomas M. Barba, an attorney in the law firm of Steptoe & Johnson, L.L.P., hereby certify that I have on this February 7, 2000 caused to be served by first class mail, postage prepaid, or by hand delivery, a copy of the foregoing Opposition to the following:

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